

Honorable Judge Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CLYDE RAY SPENCER ,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO
RECONSIDER CAUSATION
INSTRUCTIONS

NOTED: JANUARY 22, 2014

I. INTRODUCTION

Plaintiff seeks reconsideration of the Court's oral ruling on January 17, 2014 that defendants' proposed jury instruction number 7 is a correct statement of the law – i.e., that plaintiff must prove “but for” causation in this case, rather than plaintiff's proposed “moving force” instruction on the requisite element of proximate cause. On January 21, 2014, the Court stated that proof of “but for” causation is required for plaintiff's Fourth Amendment claims of malicious prosecution, false arrest and false imprisonment, which are subsumed within plaintiff's deliberate fabrication claim. However, the Court queried whether “but for” causation also is the applicable standard for plaintiff's Fourteenth Amendment substantive due

1 process claim for alleged deliberate fabrication of evidence, noting the law appears unclear on
 2 this latter question. For the reasons set forth below, the jury should be instructed that plaintiff
 3 must prove “but for” causation with regard to all of his claims, and there should not be
 4 different causation instructions for plaintiff’s Fourth Amendment claims and his Fourteenth
 5 Amendment claim.

6 **II. LAW AND ARGUMENT**

7
 8 An instructive case distinguishing the case of *Ricciuti v. N.Y.C. Transit Auth.*, 124
 9 F.3d 123 (2nd Cir.1997), relied on by plaintiff is *Rolon v. Henneman*, 443 F. Supp. 2d 532,
 10 539 (S.D. N.Y. 2006). The *Rolon* court analyzed the issue as follows: “Where a particular
 11 Amendment ‘provides an explicit textual source of constitutional protection’ against a
 12 particular sort of government behavior, ‘that Amendment, not the more generalized notion of
 13 substantive due process,’ must be the guide for analyzing these claims.” (quoting *Albright v.*
 14 *Oliver*, 510 U.S. 266, 273 (1994) and *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Further,
 15 the *Rolon* court explained that “a section 1983 claim for fabrication of evidence, like a claim
 16 for malicious prosecution, arises under the Fourth Amendment. The Fourteenth Amendment
 17 only serves as the vehicle by which the Fourth Amendment is applied to the States.” *Rolon*,
 18 443 F. Supp. 2d at 539 (citing the Ninth Circuit case of *Chewya v. Baca*, 130 Fed. Appx. 865,
 19 868 (9th Cir. 2005) as being in accord, which recognized a Fourth Amendment right not to be
 20 prosecuted on the basis of false evidence). Similar reasoning was applied in *Stoot v. City of*
 21 *Everett*, 582 F.3d 910, 918, 919 n.9 (9th Cir. 2009), where the court stated: “By virtue of its
 22 ‘incorporation’ into the Fourteenth Amendment, the Fourth Amendment requires the States to
 23 provide a fair and reliable determination of probable cause as a condition for any significant
 24 pretrial restraint of liberty” and further noted that in a civil rights case challenging the
 25
 26

1 plaintiff's arrest and prosecution for child rape "the question before us remains whether the
2 information available to [detective] Jensen at the time of the seizure was sufficiently reliable
3 to constitute probable cause."

4 As these cases illustrate, the standard "but for" causation test applies to deliberate
5 fabrication claims just as it applies to malicious prosecution, false arrest or false imprisonment
6 claims that are premised on alleged deliberate fabrication of evidence. As was held in *Hervey*
7 *v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995), the law of this Circuit is that a plaintiff alleging
8 deliberate fabrication must show both that a defendant deliberately fabricated evidence and
9 that, but for that deliberate fabrication, probable cause was absent. To instruct the jury
10 otherwise, as plaintiff advocates, would be contrary to the above-cited authorities.

11 Even where courts have deemed a Fourteenth Amendment claim analytically
12 independent from a Fourth Amendment claim, "but for" causation has nonetheless been
13 applied to Fourteenth Amendment deliberate fabrication of evidence claims. *E.g., Whitlock v.*
14 *Brueggemann*, 682 F.3d 567,583, 586-87 (7th Cir. 2012) (applying "but for" causation to a
15 Fourteenth Amendment deliberate fabrication of evidence claim, reasoning that "the actions of
16 an official who fabricates evidence that is later used to deprive someone of liberty can be both
17 a but-for and proximate [legal] cause of the due process violation a plaintiff could show
18 that the fabrication was a but-for cause of his conviction."). In accord *Hennick v. Bowling*,
19 115 F.Supp.2d 1204, 1207-09 (W.D. Wash. 2000) (disagreeing with the court's analysis relied
20 on by plaintiff in *Ricuitti*). The injury flowing from a deliberate fabrication claim is the
21 resulting loss of liberty; but for the alleged fabrication, the injury would not have occurred.
22 *See id.*

III. CONCLUSION

Based on the foregoing reasons, defendants respectfully request that plaintiff's motion to reconsider should be denied.

RESPECTFULLY SUBMITTED this 22nd day of January, 2014.

s/Jeffrey A. O. Freimund
JEFFREY A. O. FREIMUND, WSBA No. 17384
Freimund Jackson & Tardif, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98502
Email: jeffF@fjtlaw.com
Attorney for defendant Michael Davidson

s/Guy Bogdanovich
GUY BOGDANOVICH, WSBA No. 14777
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
Email: gbogdanovich@lldkb.com
Attorney for defendant Sharon Krause

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Douglas H. Johnson, Attorney Pro Hac Vice for Plaintiff Clyde Ray Spencer

dhjohnson43@aol.com

Kathleen T. Zellner, Attorney Pro Hac Vice for Plaintiff Clyde Ray Spencer

kathleen.zellner@gmail.com

Daniel T. Davies, Attorney for Plaintiff Clyde Ray Spencer

dandavies@dwt.com

s/Kathrine Sisson

KATHRINE SISSON

Legal Assistant to

JEFFREY A. O. FREIMUND, WSBA No. 17384

Freimund Jackson & Tardif, PLLC

711 Capitol Way South, Suite 602

Olympia, WA 98502

Telephone: (360) 534-9960

Fax: (360) 534-9959

jeffF@fjtlaw.com

Attorney for defendant Michael Davidson